

REMARKS

Reconsideration and withdrawal of the rejections of this application and consideration and entry of this paper are respectfully requested in view of the herein remarks, accompanying information, the Amendment After Final Office Action Under 37 C.F.R. § 1.116 filed September 22, 2003 and the Request for Continued Examination (RCE) Transmittal filed November 24, 2003, which place the application in condition for allowance.

THE REJECTION UNDER 35 U.S.C. § 103 IS OVERCOME

Claims 1-4, 6-8 and 10-15 were rejected under 35 U.S.C. § 103, as allegedly being unpatentable over Ortel *et al.* and Momma *et al.* in view of Mueller *et al.* and Santini *et al.* The rejection is traversed.

It is submitted that Ortel *et al.* is not a prior art document. The Declaration Under 37 C.F.R. § 1.132 (hereinafter "Declaration") filed September 22, 2003 states that Ortel *et al.* is not the work of others as defined by 35 U.S.C. §102(a). The Declaration is sufficient to overcome the grounds of rejection of claims 1-4, 6-8 and 10-15 under 35 U.S.C. § 103(a) because the Declaration clearly states that N. Chen, J. Brissette, and G.P. Dotto did not make an independent inventive contribution to the invention claimed in this application. Should the rejection be maintained, the Examiner is requested to indicate how the Declaration fails to successfully overcome the grounds of rejection.

Ortel *et al.* is also not prior art under 35 U.S.C. § 102(b); the priority date of this application is June 3, 1999, and the publication date of Ortel *et al.* is June 10, 1998. Therefore, Ortel *et al.* cannot be properly cited as prior art against the present application. (See *In re Katz*, 687 F.2d 450, 215 USPQ 14 (CCPA 1982)).

In the Advisory Action mailed December 3, 2003, the Examiner alleged that Applicants provided no factual evidence to support the statement that the publication date of Ortel *et al.* is June 10, 1998. Also in the Advisory Action, the Examiner invites the Applicants to submit objective evidence that Ortel *et al.* was not mailed by the publisher and/or not received by subscribers prior to the date of application.

Applicants submit as Exhibit A objective evidence that Ortel *et al.* was not mailed by the publisher and/or not received by subscribers prior to the date of application. Exhibit A includes a copy of a facsimile from the British Library indicating that Ortel *et al.* was received by the

British Library Document Supply Centre on June 2, 1998 and then catalogued on June 4, 1998. As a result, Ortel *et al.* would not have been available for public use before June 4, 1998. Also included as part of Exhibit A is a copy of the title page and Ortel *et al.* The date stamp on the title page clearly states that Ortel *et al.* was catalogued on June 4, 1998, which is less than one year after the priority date of the present application, *i.e.*, June 3, 1999. Applicants respectfully remind the Examiner that public accessibility is the touchstone of whether a reference constitutes a printed publication (*See In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986)). Accordingly, Ortel *et al.* cannot be properly cited as prior art against the present application.

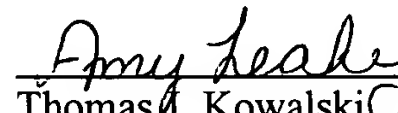
Reconsideration and withdraw of the rejection under 35 U.S.C. § 103 are respectfully requested.

CONCLUSION

In view of the remarks and Exhibit A attached herewith, the application is believed to be in condition for allowance. Favorable reconsideration of the application and prompt issuance of a Notice of Allowance are earnestly solicited. The undersigned looks forward to hearing favorably from the Examiner at an early date, and, the Examiner is invited to telephonically contact the undersigned to advance prosecution. The Commission is authorized to charge any fee occasioned by this paper, or credit any overpayment of such fees, to Deposit Account No. 50-0320.

Respectfully submitted,
FROMMER LAWRENCE & HAUG LLP

By:


Thomas J. Kowalski
Reg. No. 32,147
Amy Leahy, Ph.D.
Reg. No. 47,739
(212) 588-0800